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Colorado Supreme Court Decisions

Dicta Editorial Board

COLORADO SUPREME COURT DECISIONS

(EDITORS NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

BOXING COMMISSION—DISCRIMINATION — CONSTITUTIONAL LAW—No. 11969.—*Antlers Athletic Association vs. Hartung, et al, as Members of State Boxing Commission—Decided December 31, 1928.*

Facts.—The Athletic Association is a non-profit corporation organized for the purpose of conducting boxing exhibitions, the profits of which are turned over to various charities under the auspices of the Benevolent and Protective Order of Elks. This action was brought to test the validity of the statute permitting boxing exhibitions, providing for a Boxing Commission, and prescribing that no such exhibition shall be conducted unless 5% of the gross receipts are paid as a tax and unless the promoter of the exhibitions owns the place where they are to take place or has a lease for at least one year. Various ex-service men's organizations are excepted from these provisions and the Association contends that this is an unconstitutional discrimination.

Held.—Exhibitions such as prize fighting, which are conducive to disorder, may be forbidden altogether by the statute and are subject to regulation by the legislature, which may prescribe conditions under which such exhibitions may be given. The alleged discrimination in favor of ex-service men's organizations is within the discretion of the legislature.

Judgment Affirmed. _____

CANCELLATION OF INSTRUMENTS—FAILURE OF CONSIDERATION.—No. 12201.—*Charles Fischer vs. Robert J. Hill.—Decided January 21, 1929.*

Facts.—The plaintiff below signed a note for $1500, payable to the defendants, and the trust deed securing the same. One Siener negotiated the loan, and caused the trust deed to be recorded. The plaintiffs were borrowing the money represented by the note from the defendants, and the loan was arranged through Siener. Defendants gave him the cash and

plaintiffs gave him the note and trust deed. He appropriated the money, recorded the trust deed and kept the note. Three days later he was arrested and was sent to the penitentiary. In the lower court a question as to whose agent Siener was was submitted to the jury, which found that he was acting as agent for the defendants. The evidence was conflicting.

Held.—The evidence being conflicting and the matter having been properly submitted to the jury, their finding that Siener was the agent of the defendants will not be disturbed and that finding necessitates the conclusion that there was a failure of consideration as the plaintiffs received nothing for the execution of the note and trust deed.

Judgment Affirmed.

CORPORATIONS—POWER OF DIRECTORS TO MORTGAGE PROPERTY.—No. 12,176.—*Metalloid Company vs. Luboil Refining Company et al.—Decided January 21, 1929.*

Facts.—The Luboil Company being indebted to the Metalloid Company on an open account borrowed an additional amount, and pursuant to a resolution of the Board of Directors, the Vice President and Secretary of the Luboil Company executed and delivered its promissory note for the combined amounts, payable to the order of the Metalloid Company, and also delivered a mortgage to secure the payment of the note. The Luboil Company is a manufacturing corporation and the mortgage covered all of its property. The matter was never considered at any meeting of the stockholders, nor was any stockholders meeting called for that purpose. The Metalloid Company brought suit to foreclose the mortgage, and certain stockholders of the Luboil Company intervened and resisted the foreclosure.

Held.—That Section 2263 Compiled Laws of 1921 is for the protection of stockholders, and a mortgage executed in violation of such provisions will be declared void. In the instant case there having been no stockholders meeting and the mortgage not having been submitted to the stockholders as provided for by Section 2263, the mortgage is not good as to them and cannot be foreclosed. The fact that some of the directors were also stockholders does not obviate the difficulty

for they acted as directors and not as stockholders. The statute need not be pleaded but is one of which the Courts take judicial notice.

Judgment Affirmed.

FRAUD—LEGAL PROCESS.—No. 12168.—*Dixon vs. Bowen.—Decided January 28, 1929.*

Facts.—The plaintiff brought an action to recover damages as the result of a conspiracy formed and carried out by the defendants whereby in an action unlawfully brought by one of the defendants against the plaintiff, all of the defendants fraudulently with intent to cheat and defraud the plaintiff procured a judgment against him on an alleged debt which the plaintiff did not owe, and enforced the same by wrongful seizure and sale of his automobile. A demurrer was filed to the complaint and whether the complaint stated facts sufficient to constitute a cause of action was raised. The lower court sustained the demurrer.

Held.—The Complaint clearly states facts sufficient to constitute a cause of action for fraudulently making use of legal proceedings. It is not a suit to set aside the judgment upon which the legal process issued, but is clearly an action which in itself recognizes the judgment, but proceeds on the theory that the judgment has been paid in law and satisfied, and the plaintiff seeks judgment to recover damages for the fraud of the defendants in procuring it.

Judgment Reversed.

PRACTICE—PLEADING.—No. 12167.—*David vs. Gilbert.—Decided January 28, 1929.*

Facts.—Action to recover damages for breach of contract. The plaintiff and defendant entered into a contract for the sale and purchase and trade of certain automobiles. The plaintiff alleged a full compliance with the terms of the contract on his part, and that the defendants refused to deliver the new automobile and refused to return the consideration paid at the execution of the contract. The defendant denied that the plaintiff had complied and stated that the plaintiff had failed to sign an order as required on the original con-

tract. The plaintiff's replication denied all new matter. The plaintiff admitted that he had not signed an order, but stated that the defendant was fully familiar with the type of car, and that the defendant had waived that requirement. The case was tried to a jury resulting in a verdict in favor of the plaintiffs. Defendant filed a motion for judgment *non obstante veredicto,* and also a motion to set aside the verdict and grant a new trial. Both motions were denied and judgment was entered in accordance with the verdict.

Held.—A motion for judgment *non obstante veredicto* is a motion belonging peculiarly to a plaintiff, and should not be considered when interposed by the defendant. There was no error in the refusal to sustain said motion, neither was there any error in the admissibility of evidence. The pleadings clearly raised an issue of all matters and the answer in itself made a complete issue, and nothing could be added by alleging as new matter what had already been made an issue in the case by denial.

Judgment Affirmed.

TAXATION — EXTENT FOR HIGH SCHOOL DISTRICT. — No. 12269.—*Curtis vs. Montrose High School District—Decided January 11, 1929.*

Facts.—The Trial Court awarded a peremptory writ of mandamus directing Curtis as County Assessor of Montrose County to extend upon his books a levy of 5 mills for the current expenses of the Montrose County High School District. The Board of County Commissioners made a levy of 5 mills, which is 1 mill in excess of the limit prescribed in Sections 8411 and 8412 of the Compiled Laws. The Colorado Tax Commission approved the increase to 5 mills, but the Assessor extended the levy for 4 mills only, refusing to extend it for 5 mills, and brings the decision of the Trial Court granting the peremptory writ of mandamus to the Supreme Court for review.

Held.—That Sections 8411 and 8412 of the Compiled Laws of 1921 control the facts in this case, and Section 7216 of the Compiled Laws of 1921 does not afford the right to an additional levy. The tax for High School purposes, under

the law and under all of the Sections above referred to, may not legally exceed 4 mills.

Judgment Reversed.

TROVER—FRAUD AS DEFENSE—RIPENED FRUIT AS SUBJECT.—No. 12252.—*Koerner et al. vs. Wilson—Decided January 14, 1929.*

Facts.—Wilson brought suit against Koerner, who was the Sheriff of Fremont County, and against Chillino, who was a judgment creditor of the plaintiff's father, in trover for the wrongful seizure by the defendant of certain property in the possession of the plaintiff, which belonged to the plaintiff to-wit: apples and apple boxes, some of the apples being on the ground and some on the tree. Judgment was entered for plaintiff and defendant appealed.

Held.—That the defense of fraud in an action of trover must be affirmatively pleaded and proved.

Ripened fruit, though still on the tree, is under the circumstances of this case *fructus industriales* and properly the basis of an action in trover, being personal property.

Judgment Affirmed.

RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of Dicta to note any interesting decisions of the United States District Court, the Denver District Court, the County Court, the Juvenile Court, and occasionally the Justice Courts.)

DENVER DISTRICT COURT—No. 99562, Div. II.—*City and County of Denver vs. William S. Lail and Federal Surety Company—James C. Starkweather, Judge.*

Facts.—Action by City to recover, on Lail's bond as Public Trustee, moneys received by Lail and not paid over in the sum of $7,233.60, and a penalty of 25% thereon, together with interest. On and prior to July 23, 1924, Lail was Clerk and Recorder, Ex-officio Clerk of the City and County of Denver, appointed thereto by the Mayor at a salary of $2500.00 a year, as fixed by the Charter. On that date, the Mayor in writing appointed Lail to be "Public Trustee of the City and County of Denver". Lail and the Federal Surety Company as surety executed a bond reciting Lail's appointment "to the office of